

No. 22,078

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

NOEL HUNT McROBERTS, *et al.*,

Appellees.

On Appeal From the United States District Court
for the Central District of California.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

Jurisdictional Statement.

The appellees brought this action for personal injuries against the United States under the Federal Tort Claims Act for damages caused by the negligent driving of a serviceman. In a separate trial limited to the issue of whether or not the serviceman was acting within the scope of his employment for the United States Government, the United States District Court for the Central District of California entered judgment of \$69,700.00 in favor of the appellees. 28 U.S.C. 1291 controls the jurisdiction.

Case Statement.

This is an action for damages under the Federal Tort Claims Act for personal injuries caused on November 20, 1963, by the negligent driving of Airman Second Class Aaron G. Bryant. While Bryant was attempting a negligent passing maneuver, the automobile of appellee Noel Hunt McRoberts collided with an automobile driven by Ray Allen Gorham. McRoberts suffered personal injuries and his wife and mother-in-law were killed. With the exception of what the appellant's argumentatively claim Airman Bryant "could have" done and that he was "taking full advantage" when he left Travis Air Force Base on November 19, 1963, pursuant to his service orders (App. Op. Br. p. 4, lines 1 and 3), the appellees accept the appellant's statement of the case.

I.

Chapin v. United States (1958), 258 F. 2d 465 (C.A. 9), and United States v. Romitti (1966), 363 F. 2d 662 (C.A. 9), Are the Only Two Crucial California Scope of Employment Decisions.

There is no question that the United States is liable for injuries caused by negligent acts of Governmental employees operating within the scope of their employment. 28 U.S.C. 1346(b), 2674. The single issue on appeal is whether or not Airman Bryant was acting within the scope of his employment when the accident occurred. Two Ninth Circuit cases are germane to this discussion: *Chapin v. United States* (1958), 258 F. 2d 465 (C.A. 9), and *United States v. Romitti* (1966), 363 F. 2d 662 (C.A. 9). *Chapin* relied solely on *McVicar v. Union Oil Co.* (1956), 138 Cal. App. 2d 370, a "transfer case" involving an employee of United Air Lines. *Chapin* stated "(T)hat no single relevant factor is

necessarily controlling . . . In each case involving scope of employment, all of the relevant circumstances must be considered and weighed in relation to one another (citation)". Since through *McVicar Chapin* took a very narrow view, *Chapin* clearly rests on restricted authority. For this reason appellees believe it is unnecessary to reanalyze *Chapin* to help decide the instant case.

Perhaps this court realized *Chapin's* insular relevance when it decided *United States v. Romitti* (C.A. 9, 1966), 363 F. 2d 662. Imbued with the searching spirit of distilling the reasons and policies underlying the *respondeat superior* doctrine, this court decided differently in *Romitti* than it did in *Chapin*. Appellees suggest that it is not the result so much as the reasoning which sparks *Romitti* and gives California's *respondeat superior* doctrine the life and clarity which *Chapin* denies it. It seems this court was waiting for a chance to extricate itself from the *Chapin* dilemma. Or it may be that *Chapin* did not give the values and interests inherent in the *respondeat superior* doctrine the credence they deserve.

In *Romitti* the United States ordered a government employed electronics engineer to travel from a military base in Kern County to one in El Centro as part of his regular duties. The government authorized him to travel by government or commercial carrier, or by private automobile. The Government reimbursed the employee for mileage and gave him a \$16.00 per day allowance. The accident occurred when the employee was returning from El Centro to Kern County.¹

¹In *Romitti* the court said: "To summarize the trier of fact had before it evidence that Mr. Moore was traveling on *direct* (This footnote is continued on the next page)

The status of the Government employee in *Romitti* and Airman Bryant in our case is strikingly similar. Bryant received direct orders to transfer from Travis Air Force Base, California, to Pope Air Force Base, North Carolina; there was at least a dual purpose of serving his employer's business and his own personal interests; he was transporting property (flying suit, helmet, oxygen masks, assorted tools); he was on the most direct route (Route 66); he was using an expressly authorized means of transportation (his own private car as authorized by his orders); he was driving during regular working hours (November 20, 1963, at approximately 10:00 a.m.); he was receiving his regular salary and per diem plus transportation costs (Bryant received advanced travel pay of \$290.30 to cover transportation, meals and lodging).

Not unlike the Government position in this case the Government in *Romitti* argued that *Chapin* said that as a matter of law an employee driving his own automobile is not within the scope of his employment where the automobile use is permissive and not part of the employee's normal duties, and the employer exercises no control over the details of the driving.²

orders of his employer and of the sole purpose of serving his employer's business; that he was transporting property of the employee and fellow employees (including his supervisor), both necessary to the performance of that business; that he was traveling on the most direct route between two of employer's work locations; that he was using an expressly authorized means of transportation; that he was driving during regular working hours; and that he was being paid his regular salary plus per diem plus costs of transportation."

²In *Romitti* at 665, the court stated "The Government reads Chapin as deciding under California law an employee driving his own automobile cannot, as a matter of law, be acting within the scope of his employment where use of the private automobile is permissive rather than required, the employer exercises no control over the details of the driving, and driving is not part of the employee's normal duties."

Romitti stated emphatically that each case should turn on its own facts and circumstances. No single relevant factor should control. Appellees maintain that this court in *Romitti* clearly explained the policies and interests underlying application of California's *respond-eat superior* doctrine, and intuitively suggested solid notions of protection which prevail in the instant case. At page 665 this court stated:

"In the present case the flat rule which the Government suggests would preclude employer liability in circumstances in which the purpose of the rule requires its imposition."

Further at 665 *Romitti* cited Chief Justice Traynor's language and said:

"The principal justification for the application of the doctrine of *respond-eat superior* in any case is the fact that the employer may spread the risk through insurance and carry the cost thereof as a part of his costs of doing business."

Romitti said that this purpose required the employer to assume those risks incident to his business, but not to an employee's purely personal pursuits:

"Thus when *respond-eat superior* liability is asserted, we are not . . . looking for the master's fault but rather for risks that may fairly be regarded a typical of or broadly incidental to the enterprise he has undertaken (citation)." Page 666.

Obviously the *Romitti* court believed that the underlying risk distribution principles justifying the *respond-eat superior* doctrine applied. The economic allocation-distribution rational is not novel to American juris-

prudence. However, it is gaining dramatic acceptance in assorted legal fields from California's strict liability in tort to its application of *respondeat superior*, and all relevant areas in between. In *Romitti* the United States Government was the "master" against whom they were asked to apply the *respondeat superior* doctrine. In *Chapin* this same court said no distinction should be made between a private employer and a government employer for the purposes of applying this doctrine. Apparently the court felt that the reasons justifying the rule applied equally to the Government in *Romitti* as it would to any private employer under different facts. Appellees infer from this court's language in *Romitti* that the purpose of the *respondeat superior* doctrine is to protect innocent people harmed through no fault of their own, and not to insulate principals from the negligence of their agents. The master distributes the liability costs over the entire economic base of his activity. Liability insurance is the common method:

"We are no longer dealing with specific conduct but with the broad scope of a whole enterprise. Further, we are not looking for that which can and should reasonably be avoided but with the more or less inevitable toll of a lawful enterprise. These are the standards applied by California courts." (emphasis aded) *Romitti*, page 666.

Surely the court in *Romitti* was not suggesting that the United States Government should take out policies of liability insurance. Perhaps *Romitti* meant to infer that the breadth of the United States Government's economic base was sufficient to absorb the costs of liability imposed in personal injury suits in which the United States was a defendant.

Appellees maintain that the purpose of the *respondeat superior* doctrine is to protect injured people by compensating them for injuries incurred through no fault of their own. The focus of the reason underlying the rule is not to insulate employers from liability for their servants but to protect innocent people who are injured. In this context this court's attitude shift from *Chapin* to *Romitti* is significant. The different results are not critical. The court's attitude and the policies it enunciates about California's *respondeat superior* law is. In 1958 this court said through *Chapin* that the master, the United States Government, was the one the law should "protect". In 1966 this court said in *Romitti* that the innocent injured person was the one the law should "protect". The attitude change is dramatic and unequivocal:

"The principal justification for the application of the doctrine of respondeat superior in any case is the fact that the employer may spread the risk through insurance and carry the cost thereof as part of his costs of doing business." (emphasis added) *Romitti* page 665.

In *Romitti* the employee was a civilian engineer employed by the United States and assigned to Edwards Air Force Base, Kern County, California. In the present case Mr. Bryant was an Airman Second Class in the United States Air Force. If this court accepts the notion that the protective features of California's *respondeat superior* law focus on innocently injured people, and support this view with the risk distribution features the court articulated, then certain results in this case necessarily follow.

Are there sound reasons for saying a civilian governmental employee can act as a conduit to his employer's

vicarious liability, but a serviceman cannot? If the policy is to protect injured people by imposing vicarious liability on a master for his servant's negligence, are there reasons for distinguishing either the positions of the injured plaintiffs in *Romitti* and in this case, or the masters against whom these plaintiffs seek to impose liability?

The answer is an unequivocal No! The Federal Tort Claims Act makes the United States liable under those circumstances where a private person or organization would be liable. By the terms of the Statute no such distinction can be drawn.

II.

California Vehicle Code's Comprehensive Protective Scheme Requires a Decision Consistent With the Policies This Scheme Hopes to Promote.

A critical feature of California's vehicle laws reinforces appellees' position. California has a comprehensive protective scheme of financial responsibility³ and uninsured motorist protection⁴ designed to protect and compensate people injured through traffic accidents. Under California Vehicle Code Section 16430 each operator of a motor vehicle must be able to respond in damages to \$10,000.00 for each individual injury and to \$20,000.00 if two or more receive injuries in the same accident.⁵ If the motor vehicle operator is not

³Vehicle Code § 1600, *et seq.*

⁴Insurance Code § 11580.2. This is the "uninsured motorist" section. In effect it insures each driver against injury caused by an uninsured driver.

⁵The new 1968 amendment requires the same coverage but increases the amount: "Proof of ability to respond in damages where required by the code means proof of ability to respond in damages resulting from the ownership or operation of a motor vehicle and arising by reason of personal injury to, or death of,

financially responsible, the California Department of Motor Vehicles suspends his license and automobile registration.⁶ Usually the proof of financial responsibility takes the form of a normal liability insurance policy. Obviously, the California legislature wants to compensate injured people, and to insure that they have recourse to economic reserves.

Under California's financial responsibility requirements, Pfc. Frehe in *Chapin*, engineer Moore in *Romitti*, and Airman Bryant in this case would all lose their California driving privileges if they could not meet California's financial responsibility requirements. The ability to respond financially in damages is a mandatory prerequisite of the privilege of driving in California. Should the law apply differently to these three men? A decision inconsistent with the District Court's position would suggest that if these men had no automobile insurance, the legislature meant to abrogate this law where Government employees negligently operated motor vehicles in the course and scope of their employment. This would be wholly inconsistent with California's financial responsibility policies, and with the purpose of the *respondere superior* doctrine.

If the Government need not respond in damages under California's comprehensive protection scheme, the result thwarts the law's obvious policies: the innocent injured party cannot recover; the Government employer does not have to distribute this risk as a cost of

one person, of at least * * * Fifteen Thousand Dollars (\$15,000), and, subject to the limit of * * * Fifteen Thousand Dollars (\$15,000) for each person injured or killed, of at least * * * Thirty Thousand Dollars (\$30,000) for such injury to, or the death of, two or more persons in any one accident . . ." (As amended Stats. 1967, c. 862, p. § 5, operative July 1, 1968).

⁶Vehicle Code § 1600, *et seq.*

doing business; and the employee tortfeasor loses is California driving privilege. These results make it clear that if this court reversed the District Court, its decision would contravene the established and supposed policies articulated by this court in *Romitti* and established by the California legislature in the Vehicle Code.

III.

Considerations of Temporary vs. Permanent Duty Stations, the Number of Service Equipment Items, the Reimbursement, the Travel Hours, and the Route Are Relevant but Not Decisive on the Issue of *Respondeat Superior*.

The answer seems relatively clear. If the policy underlying the *respondeat superior* doctrine in California is to protect innocent people from injury through compensation and to allocate the costs of this financial loss over a business' entire economic base, then the facts in this case call for *Romitti's* result and reasoning. Surely Pfc. Frehe in *Chapin* was no less culpable than engineer Moore in *Romitti* and Airman Bryant in this case. Nor was Mr. Chapin less innocent than Messrs. Romitti and McRoberts in this case. Therefore, it is not sound to say that plaintiff Chapin warrants less protection than Plaintiffs Romitti and McRoberts. Nor is it sound to say that this court should insulate the United States Government from liability based on shallow considerations. The "permanent", or "temporary" duty stations, the number of service equipment items in an automobile, the amount of travel reimbursement, the directness of the route, the exact driving hours, and the authorized transportation are superficial. A decision with the impact and ramifications that one of these facts present requires a sounder base.

Appellants agreed that the Government computes a serviceman's "travel time" according to specified regulations. The principal purpose of these provisions is to meet certain military accounting and fiscal requirements; the idea is to give a serviceman a cash travel allowance in change-of-duty orders in lieu of transportation in kind. Clearly, this is an accounting procedure not influential by what actually occurs. Thus, according to the Governments Accounting Principles, Airman Bryant's "leave" began when he left Travis Air Force Base. Since the whole period covered by Bryant's orders does not help determine his status, it is necessary to look at the indicia of agency to determine whether he was serving his master's interests at the time of the accident. The following facts are clear about Airman Bryant:

1. He acted pursuant to Government orders.
2. His orders implied both leave and travel time.
3. He received travel pay covering the time of the accident.
4. He was in military uniform.
5. He was making a temporary duty change.
6. He had Government equipment in his car.
7. He was driving an authorized vehicle.
8. He was on the most direct route towards his new base.

Traditionally, the courts looked at these indicia to decide if the serviceman was serving his master at the time of the accident. Recently, the courts have attached importance to whether the change was permanent or temporary. Airman Bryant's transfer was

temporary. These agency indicia make it clear. Bryant was within the course and scope of his employment.

This court in *Romitti* abandoned some of these traditional indicia formerly on by prior decisions to establish a basis for recovery:

“Similarly, the failure of the employer to exercise control over the employees driving is a factor of varying importance. *Existence of the power to control the physical details of the service may be crucial when the question is whether the actor is an agent or an independent contractor but may be relatively insignificant in determining whether an admitted agent is acting within the scope of his employment.*” (emphasis added) at page 666.

Nor is appellant’s contention critical that Airman Bryant planned to devote part of his leave time for purely personal reasons:

“We assume that in exercising the election which the United States gave these employees to use a private vehicle in performing the employer’s errand, *the employees were motivated at least in part by considerations of personal comfort and convenience. Nevertheless, the choice also served the interests of the United States and this is enough.*” (emphasis added) at page 666.

And with sanguine glee this court quashed traditional constrained applications of the employer-personal convenience rational and declared:

“*In addition under California doctrine where the risk is one arising out of the employment the employer is liable even though the act causing harm may serve the employee’s needs and not those of the employer.*” (emphasis added) at page 666.

It is clear this tribunal must decide this appeal according to California law.⁷ The guagmire of relevant cases from other jurisdictions are confusing, inconsistent and inapplicable to this case. This court must face *Chapin* and *Romitti*, the only two California decisions on whether California's doctrine of *respondeat superior* imposes liability on a Government employer for negligent vehicle operation by its employee. Neither case controls. The plaintiff's loss in *Chapin* and win in *Romitti* is not significant. However, this court's attitude in *Romitti* is. Although *Chapin* may be inapplicable to these facts, appellees need not urge *Chapin's* reversal in order to resolve this case. Nor is it necessary to follow *Romitti*. Interestingly, appellants rely heavily on *Chapin*, but avoid *Romitti* with casual indifference except for an empty reference that each case turns on its own facts.

Chapin and *Romitti* reflect divergent views on California's *respondeat superior* law. However, appellees do not believe they present the judicial traveler with equal alternatives. *Chapin* is circumscribed. *Romitti* is innovative. The Government interprets *Chapin* now just as it did in *Romitti*. Appellees agree with the Government's interpretation of *Chapin*. Yet this court rejected this interpretation in *Romitti* because it was too restrictive. Appellees urge this court to do it again. Appellees respectfully submit that this court should affirm the District Court's decision that Airman Bryant was acting within the scope of his employment.

⁷*William v. United States*, 350 U.S. 857.

Conclusion.

Appellees respectfully submit that the United States Court of Appeals for the Ninth Circuit should affirm the judgment of the District Court in favor of Noel Hunt McRoberts, *et al.*

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By DANIEL C. CATHCART,
Attorneys for Appellees.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DANIEL C. CATHCART